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### The Great Cross-Media Ownership Controversy

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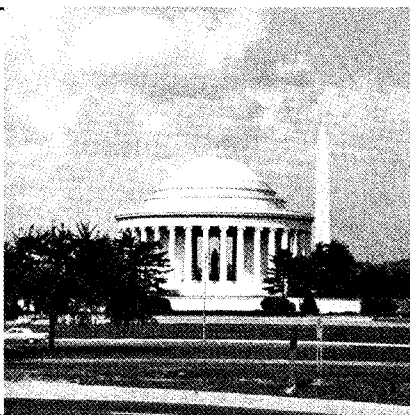
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# The Lawyer's Washington



## The Great Cross-Media Ownership Controversy

By Harvey L. Zuckman and Roy L. Mason

**W**HEN THE Department of Justice filed petitions with the Federal Communications Commission last January to deny the applications of Cowles Communications, Pulitzer Publishing Company, and Newhouse Broadcasting Corporation for AM, FM, and TV station license renewals, the action generated political and legal shock waves that reached from the White House to Capitol Hill to midtown, where the F.C.C. has its headquarters.

Nicholas Johnson, then an F.C.C. commissioner, accused the Nixon administration of waging war on the press at its most vulnerable point. Without a careful examination, it appeared to be a politically motivated attempt by the administration to intimidate and retaliate against a perceived hostile press. But the *Washington Post*, that bête noire of the Nixon administration and holder of radio and television licenses itself, concluded after an exhaustive investigation that there was no evidence that the action to strip broadcast licenses from newspapers was ideologically inspired or dictated by the White House.

In fact, rather than being politically motivated, Justice's action was in response to pressures from public interest law firms and consumer groups, particularly the Citizens Communications Center, to break up media concentration. Key men in the Antitrust Division (called the "mad dogs" by broadcast industry representatives) believe cross-media ownership lessens competition, impedes the free flow of news, and is against the public interest.

If the political controversy is a phantom, the legal and legislative battles on the Hill and before the

F.C.C. are real and bitter. Congressional reaction to Justice's filings was immediate with the introduction of legislation (H.R. 12993) designed to prohibit the F.C.C. in license renewal proceedings from considering ownership interests in or official connections of the licensee with other communications media. The bill, which might more properly be called the National Association of Broadcasters-American Newspaper Publishers Association Relief Act of 1974, also prohibits the F.C.C. from breaking up media concentration by general rule unless done within six months of enactment of the bill.

All reaction was not unfavorable. The F.C.C. resurrected its long dormant rule-making proceeding (Docket No. 18110). The proposed rule would limit, through license divestiture, a party's media holdings in any given market to one or more daily newspapers, or one TV station, or one AM-FM radio combination. The F.C.C. had invited comments from interested parties to be submitted by August, 1970. Then a funny thing happened on the way to the hearing room. Nothing happened! That is, until February 28, 1974—two months after Justice's filings—when the F.C.C., with a new chairman, Richard E. Wiley, called for updated comments and scheduled hearings.

As passed by the House on May 1, H. R. 12993 prohibits the F.C.C. in renewal applications from considering "the ownership interests or official connections of the applicant in other stations or other communications media or other businesses . . . unless the commission has adopted rules prohibiting such ownership interests or activities or prescribing management structures. . . ."

The F.C.C. hearings on its revived Docket No. 18110 were held July 24-26, and interested parties came in rec-

ord numbers. Organizations airing their views included the N.A.B., the A.N.P.A., the National Black Media Coalition, the National Citizens Committee for Broadcasting (Nick Johnson's organization), the Citizens Communications Center, the Center for Policy Research (associated with Columbia University), various F.C.C. licensees, self-appointed media watchers, and the Justice Department.

### Burden on Status Quo Defenders

Barry Grossman, representing the Justice Department, led off by rejecting the broadcast industry's position that the F.C.C. must dismiss the proceeding because there was no evidence that colocated cross-media ownership affects competition for local advertising or the free flow of news. He argued the only proper test was "a reasonable ground for believing that increased diversity of media ownership through divestiture would improve the flow of news, encourage diversity of viewpoints, and stimulate economic competition." In effect, he attempted to place the burden of proof on those defending the *status quo*.

Mr. Grossman distinguished between divestiture of licenses and nonrenewal as they relate to the economic impact on the licensee. Divestiture over a period of five years after the next license renewal (as much as eight years) would permit a daily newspaper publisher licensee to sell or exchange either his newspaper or his station at fair market value and not at distress. Nonrenewal, on the other hand, might amount to a forfeiture of the licensee's capital investment since a new licensee on the vacated channel would very likely prefer to purchase more modern equipment. Moreover, if, as in the celebrated nonrenewal case of WHDH-TV, which was owned by the *Boston Herald Traveler*, the station is subsidizing the newspaper operation, the newspaper would have to fold because

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no new income stream could be created. In the case of a divestiture sale, the proceeds of the sale would be available to create that stream.

A weakness in Justice's argument, as pointed out by industry spokesmen, is the uncertainty whether a substituted income stream would do as well as the old one. VHF television licensees, for example, in large markets earn back their total investment within one year of operation and three times the investment within the initial three-year license period. Another weakness lies in the suggestion that to meet the requirements of divestiture, publisher-licensees could swap stations among themselves and with licensees in other markets. This would create more absentee ownerships, a situation at odds with F.C.C.'s policy of encouraging local ownership.

But if Justice's case was weak, so was that of the publishers and broadcasters. Arthur B. Hanson, general counsel to A.N.P.A., argued that Justice lacked standing to participate in a rule-making proceeding. He bitterly attacked the Antitrust Division for "invidiously insinuating itself" into the affairs of an independent regulatory agency and for attempting to make the commission into an antitrust en-

forcement arm of the Department of Justice.

Commissioner Glen O. Robinson asked Mr. Hanson if a rule-making proceeding would be justified if the F.C.C. on its own found colocated common media ownership to be in violation of the antitrust laws. He responded in the negative, claiming the F.C.C. could do nothing about antitrust violations generally. He added, however, that the F.C.C. could consider individual violations in license renewal proceedings.

Most commissioners did not appear to be impressed by these arguments, so Mr. Hanson made a stronger point. This was that the number of colocated cross-media combinations had declined from ninety-seven to eighty-three since the commission's rule-making proceeding was commenced in 1970. Just before these hearings the Knight and Ridder newspaper chains announced that as a part of their proposed merger they would divest themselves of interests in three television and nine radio stations, including WCCO, an AM-FM-TV operation in Minneapolis-Saint Paul whose license renewal is currently being challenged by the Justice Department.

At the second day of the hearings

the N.A.B. took up the cudgels to pound Justice again. Industry strategy was clear: attack Justice and ignore the arguments of the less influential organizations, such as the N.C.C.B. The industry's theme was that without Justice's meddling the hearings would never have been called. And, by heaven, it resented having to defend its way of doing business!

### Loevinger Drew Flak

Lee Loevinger, a former commissioner now speaking for the N.A.B., agreed with A.N.P.A. that the F.C.C. had no authority to enforce antitrust policy by general rule. Justice's role in the proceeding, he said, should be given no special weight since it had no greater understanding of the public interest than anyone else and had no expertise in mass communications. If it wants to enforce the antitrust laws, he added, let it go to court.

Mr. Loevinger drew some flak, particularly from Chairman Wiley. This colloquy taken from our notes, though not as accurate in wording as the official transcript would be, is substantially correct and is extremely important in highlighting the dilemma the commission faces.

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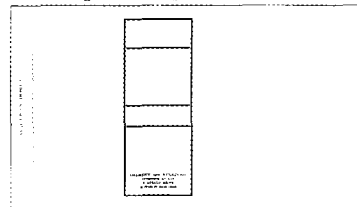
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concentration in a large number of the colocated markets?"

LOEVINGER: "The undue concentration standard utilized by the commission is permissible, but the Department of Justice's 'possible antitrust abuse' standard is improper. However, the record shows no undue concentrations to justify the proposed rule."

WILEY: "Some markets are clearly monopolistic. What should the F.C.C. do?"

LOEVINGER: "We call for *ad hoc* handling of those situations."

WILEY: "But the pending legislation [H.R. 12993] would prevent the commission from doing that."

LOEVINGER: "Once a determination that the issuance of a station license was in the public interest, necessity, and convenience, then there would be no relitigation except for major substantial changes in its operations."

The two-front war to immunize from attacks on monopoly or oligopoly power was apparent. From Congress, ask for relief from antitrust challenges in license renewal proceedings. Before the F.C.C., argue against a general rule and suggest the very procedure that H.R. 12993, which you support, would outlaw.

If the N.A.B. prevails, a license could not be re-examined on concentration grounds unless drastic changes occur in the station's market or operations after the initial license grant. Once having granted a license to a media monopoly, the F.C.C. could order neither divestiture nor nonrenewal because of undue concentration.

There was much speculation at the hearing as to where monopolistic media combinations exist, but no one seemed able to pinpoint them. Had counsel and the commissioners read the *Wall Street Journal* the day the hearings began, they would have learned of the so-called Shott dynasty of Bluefield, West Virginia. According to the *Journal*, the Shott family owns almost everything there: the gas supply company, the paper supply company, the printing plant, stock in both major banks, the town's only newspaper (the *Daily Telegraph*), the only television station (WHIS-TV), the only FM station, and one of the two AM stations. The Justice Department calls it "possibly the worst media monopoly in the nation." Yet the N.A.B.'s stance and H.R. 12993 would make Bluefield safe for monopoly since the monopolistic situation was present when the various broadcast licenses were initially granted, and the commission could not challenge them.

During the hearings the commissioners expressed interest in a study

conducted by Harvey Levin, an economics professor at Hofstra University and a spokesman for the Center for Policy Research. The study divided stations into two groups within each market in which there are cross-media licensees. One consisted of the cross-media owned stations and the other of the noncross-media stations. Professor Levin compared the two groups for economic performance and news and public affairs programming. His conclusions were (1) there was no economic advantage between groups, and (2) there were no major differences in programming.

Professor Levin's analysis led Chairman Wiley to muse out loud that the studies provided no very good reason for a divestiture rule and the unsettling of major economic interests that would occur in its wake.

It is safe to forecast that the F.C.C. will not promulgate a divestiture rule on the basis of this record. Rather one can expect a rule that will ban future cross-media combinations of colocated VHF stations and daily newspapers. In addition, if, as now appears likely, H.R. 12993 as passed by the House is sidetracked, then look for more vigorous inquiries by the F.C.C. into media concentration in license renewal proceedings.

It is this sort of case-by-case scrutiny that the bill seeks to prevent. It declares the F.C.C. shall not consider in a renewal proceeding the ownership interests or "official connections" of the renewal applicant with any "other communications media or other businesses." The networks would no longer have to fear the F.C.C.'s prying into their absentee ownership, because any consideration of the "participation of ownership in the management of the station" is prohibited.

The House report on the bill states that inquiries into ownership at renewal time might cause a restructuring of the industry in a "haphazard, subjective, and oft-times inconsistent manner" and that now there is nothing to prevent the F.C.C. or the courts from considering these factors. The report argues that it would be "unfair and unsound" for these considerations to be raised case by case, because a broadcaster could lose its license on cross-ownership grounds of which the F.C.C. was aware when the license initially was granted. It is interesting that the argument would seem to apply more strongly to the general rule of divestiture which the F.C.C. could promulgate within six months of enactment of the proposed legislation.

It is admitted that the broadcasters' fears have some substance. At the F.C.C. media diversification has long

been a factor in the initial selection of a licensee when there are competing applicants (1 F.C.C. 2d 393), and in the WHDH case the commission denied a license renewal on the ground (among others) that separating the TV station from the newspaper would result in greater media diversification in the community. The potential impact of that decision was not lost on the radio-TV industry. It promoted a bill, ultimately discarded, that would have effectively deterred competing applications for broadcast licenses by forcing applicants to prove the public interest would not be served by renewing the existing license.

The essential thrust of that bill was resurrected as H.R. 12993 after Justice filed petitions against renewals of licenses of cross-media owned stations all over the lot: KSD-TV-AM and KTVI (Saint Louis), WTMJ-TV-AM-FM (Milwaukee), KRNT-TV-AM-FM (Des Moines), WCCO-TV-AM-FM (Minneapolis-Saint Paul) and WIBW-TV-AM-FM (Topeka).

The anxieties were heightened by the serious challenge to the licenses of a large San Francisco media conglomerate by two private citizens. The challenge began when the Chronicle Publishing Company, owner of the only morning newspaper in San Francisco (*Chronicle*) and joint operator with the Hearst Corporation of the only major afternoon newspaper (*Examiner*), sought to renew its license to operate KRON-TV-FM in 1968. The renewal was challenged by two former *Chronicle* reporters, Albert Kihn and Blanche Streeter, who cited to the F.C.C. certain "anticompetitive" practices by the KRON-*Chronicle-Examiner* combine.

In 1964 Mr. Kihn began compiling notes on his suspicions that KRON and the *Chronicle* were according greater weight to their collective business interests than they were to journalism. "Kihn's Diary" became the basis of his, and later Mrs. Streeter's, complaints to the newspaper and television management and finally to the F.C.C. He alleged that a *Chronicle* reporter who found a great deal of public dissatisfaction with the local politicians at Vallejo was told to soft-pedal the planned exposé because KRON had cable TV interests in the area. He also found it rather strange that KRON devoted a full-color, thirty-minute television program to the San Carlos P.T.A.'s annual "chicken ball" at a time that the Chronicle Publishing Company was seeking the favor of San Carlos officials for another cable TV franchise.

Hearings were held in 1969, and two years later the hearing examiner issued his opinion (40 F.C.C. 2d 839). He

reasoned that the relevant competitive market was not the city itself but the surrounding area as well, and that all advertising done in all media, including matchbook covers, had to be considered. He concluded that since KRON-TV and the *Chronicle* receive only 7 to 8 per cent of the total advertising dollar, the San Francisco market was no more concentrated than many others.

In 1973 the F.C.C. affirmed the examiner's determination that a "plethora of media" existed in the nine-county Bay Area. The appeal of the F.C.C.'s decision is pending in the United States Court of Appeals for the District of Columbia Circuit.

In June of this year, six months after filing all those petitions to deny license renewals, the Justice Department belatedly realized that nearly identical issues would be decided by the court of appeals in the KRON case and that the decision could "importantly influence how media concentration should be measured in those cases." So the department filed an *amicus curiae* brief alleging the F.C.C. erred by considering products that do not tend to dilute the concentration of news and advertising within the KRON-*Chron-*

*icle-Examiner* group and by drawing the relevant geographic market so broadly that it necessarily included media that offer no effective competition to either the *Chronicle* or KRON.

According to Justice, the F.C.C. should have excluded all advertising except current, local advertising on radio, television, and in newspapers in determining the licensee's percentage share of the total advertising expenditures. Using this method, Justice calculated that the two newspapers plus KRON-TV and KRON-FM soak up as much as 44.1 per cent of the advertising in the San Francisco-Oakland standard metropolitan statistical area. Quoting the F.C.C.'s own *Policy Statement on Comparative Hearings* (1 F.C.C. 2d 393) for what it felt were the more appropriate and selective criteria for measuring broadcast media concentration, the brief concluded that the F.C.C. analyzed the wrong media within the wrong markets at the wrong time.

The basic conflict between the Justice Department and the F.C.C. concerns the proper standards for measuring competition. Justice argues that federal regulatory proceedings should always include consideration of basic antitrust

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criteria as set forth in such cases as *United States v. United Shoe Machinery Corporation*, 110 F.Supp. 295 (D.Mass. 1953), which was affirmed *per curiam*, 347 U.S. 521 (1954), that is, a product market exists whenever identifiable goods and services in fact compete to satisfy consumer needs. Newspapers and broadcasters make up a "product market" because news is a significant selling point for each and advertisers can and do substitute or supplement one medium with the other.

If Justice's views on cross-ownership are accepted by the court of appeals in *KRON*, the F.C.C. will be scrutinizing TV and radio station ownership more closely for cross-media concentration and will be using different criteria for determining market concentration. But don't expect mass divestitures. The commission shows little inclination to challenge existing media concentrations except in the most egregious cases and would have no authority to do so should the House version of H.R. 12993 be enacted.

At the time of the F.C.C. hearings it appeared that enactment was virtually inevitable. Sen. John O. Pastore, chairman of the Senate Commerce Committee's Subcommittee on Communications, was quoted by the *Washington Star-News* as saying, "There is a lot of

pressure to pass a bill here—and whether Pastore wants one or not, there's going to be one." That appeared to be a signal that the broadcasting lobby had too many guns for the Senate to resist passage of H.R. 12993 in substantially the same form as passed by the House.

But the combined opposition of public interest groups and the Department of Justice had great impact on Senator Pastore's subcommittee. Apparently, the subcommittee took to heart Justice's warning that the bill represents a "major shift" in national policy that would radically alter one of the fundamental underpinnings of the Communications Act—that the broadcasting industry should be governed chiefly by free competitive forces.

On September 18 the Senate Commerce Committee reported out an amended H.R. 12993 that would provide little relief to the broadcasting industry. With the addition on the floor of a provision increasing the station license renewal period from three to five years, the amended House bill passed the Senate on October 8.

Consisting of three relatively short sections, the amended bill gives licensees only the presumption that the public interest, convenience, and necessity would be served by renewal of their

license if (1) they follow applicable commission procedures to ascertain community needs, (2) they meet these needs, and (3) their operations have no serious deficiencies.

The presumption in the Senate version is a mere bone because the commission traditionally has favored existing licensees in renewal proceedings if they have stayed out of trouble and have provided an acceptable broadcast service to their primary service areas during the preceding three-year license period.

This bone will be one of contention in the Senate-House conference on the conflicting bills. With congressional adjournment scheduled before Christmas, the N.A.B. and A.N.P.A. will redouble their efforts to get an acceptable bill. But this is a short time in which to turn around a house of the Congress, and the betting in Washington is that the bill will either die or be enacted in much the same form as it passed the Senate.

As Albert Kramer, on leave as director of the antiestablishment Citizens Communication Center and leader of the coalition opposing the House-passed bill put it, "The broadcasting industry has suffered a real defeat." But the broadcasting lobby isn't going out of business. Tune in the Ninety-fourth Congress for the next chapter. ▲

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